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No. 94-87

IN THE

# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1994

ETHICON, INC.,

*Petitioner,*

*v.*

HELEN KIRWIN EISENMENGER, an incapacitated person, by VERONICA EISENMENGER, her Guardian and Conservator,

*Respondent.*

*– and –*

JAMES E. MUNGAS and MONTANA DEACONESS MEDICAL CENTER,

*Cross-Respondents.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MONTANA

## BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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## COUNTERSTATEMENT OF THE QUESTION PRESENTED

Do the Fifth and Fourteenth Amendments to the U.S. Constitution bar a state court from entering a default judgment against a defendant, pursuant to state procedural rules, as a sanction for years of willful, bad faith obstruction of the discovery process which severely prejudiced and directly interfered with obtaining correct decision in the case?

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## BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondent, Helen Kirwin Eisenmenger, an incapacitated person, by Veronica Eisenmenger, her guardian and conservator, (hereafter "Eisenmenger") submits this brief

in opposition to Ethicon's Petition for Certiorari. Eisenmenger received the Ethicon petition on July 15, 1994, and has filed this brief in opposition within the thirty-day period set forth in Rule 15.2 of the Rules of the Supreme Court. Eisenmenger agrees that this court has jurisdiction under 28 U.S.C. §1257(a).

## RULE INVOLVED

Rule 10 of the Rules of the Supreme Court:

> A review on writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only when there are special and important reasons therefor. The following, while neither controlling nor fully measuring the Court's discretion, indicate the character of reasons that will be considered:
>
> (a) . . . .
>
> (b) When a state court of last resort has decided a federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals.
>
> (c) When a state court . . . has decided an important question of federal law which has not been, but should be, settled by this Court, or has decided a federal question in a way that conflicts with applicable decisions of this Court.

## INTRODUCTION

Ethicon asks this Court to interfere in a state trial court's discretionary power to sanction Ethicon for its admitted strategy of concealing critical evidence from legitimate discovery over a period of more than three and one-half years. Ethicon's discovery abuse was not exposed

until trial was imminent and after Eisenmenger and the trial court had made critical decisions based upon the assumption that Ethicon had responded truthfully to numerous discovery requests. Ethicon's willful, bad faith conduct therefore resulted in irreparable prejudice to Eisenmenger and to the court's ability to reach a correct decision of the case.

The trial court reviewed more than twenty specific instances of discovery abuse. Intimately familiar with the case and the course of discovery, the trial court found Ethicon to have engaged in "knowing concealment" in violation of its "implicit and essential duty to answer interrogatories truthfully". (p. 43a)[1] It found responses to discovery that were "evasive and incomplete" and other responses that "were patently incorrect". (p. 44a) It determined that Ethicon's actions were "willful, deliberate, unconscionable and in bad faith" (p. 48a) and that Ethicon had "indulged in unpardonable gamesmanship" and had "violated the basic principles and spirit of the rules of procedure." (p. 44a) The court found that Ethicon's discovery abuse had prejudiced its ability to reach a just decision on the merits because it was "very doubtful" that Mungas' Motion for Summary Judgment "would have been made or granted" had the evidence concealed by Ethicon been disclosed through discovery. (p. 43a-44a) Similarly, the court noted that Eisenmenger "suffered extreme prejudice" in that it could not "be reasonably said" that she would have made certain pretrial tactical decisions but for Ethicon's concealments. (p. 44a) In considering the severity of its sanction, the

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[1]This reference and similar references hereafter are to Appendices A, B and C submitted with Ethicon's Petition for Writ of Certiorari.

trial court expressly considered and rejected alternative sanctions and determined that they were not sufficiently severe "given the extent of Ethicon's abuse and the prejudice that has been caused". (p. 44a)[2]

The Montana Supreme Court's condemnation of Ethicon's conduct was just as harsh. After reviewing various examples of Ethicon's discovery responses, the court held that this was not a situation where the "wrong" questions were asked in discovery and observed that "there was nothing more which could have been asked in order to elicit [the evidence] from Ethicon. . . ." (p. 15a) Concurring with the trial court, the Montana Supreme Court found Ethicon's conduct to demonstrate "intolerable gamesmanship and obstructiveness" and that Ethicon was "playing loose and fast with the rules of discovery". (p. 15a) Like the trial court, which observed that a party engaging in willful, bad faith discovery abuse acts "at its peril", (p. 44a) the Montana Supreme Court observed that such discovery abuse was the "equivalent to playing Russian roulette with only one chamber empty – it cannot be relied upon to lead to a favorable result." (p. 16a) The Montana Supreme Court concurred with the trial court that Ethicon's failure to respond to discovery requests was "willful and in bad faith". (p. 16a)

Contrary to Ethicon's assertion, neither court ignored due process considerations of fairness. In its Memorandum and Order dated October 8, 1992, the trial court acknowledged that due process limited the severe sanction of default judgment to "extreme circumstances in

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[2]Citing *Fjelstad v. American Honda*, 762 F.2d 1334, 1338 (9th Cir. 1985) and *Wyle v. R.J. Reynolds Corp.*, 709 F.2d 585, 589 (9th Cir. 1983).

which the deception relates to the matters in controversy" and prevents their imposition for infractions that do not "threaten to interfere with the rightful decision of the case."[3] (p. 48a) Being in the best position to know, the trial court determined that Ethicon's action "clearly interfered with the rightful decision of the case". (p. 48a)

The Montana Supreme Court was likewise concerned with due process considerations of fairness. Citing *Societe Internationale v. Rogers,* 357 U.S. 197, 212 (1958), it held that "due process requires that default may not be imposed absent willfulness, bad faith, or fault." However, it concurred that Ethicon's discovery abuses "directly interfered with the correct decision in the case" and observed that the "concealed evidence clearly went to the heart of Ethicon's defense to Eisenmenger's claim." (p. 15a) Thus, by the time Ethicon's deceptions were discovered by the trial court, "severe prejudice had already occurred to Eisenmenger, and the court had few options for appropriate and meaningful sanctions against Ethicon." (p. 15a)

The above is essential background to Ethicon's Petition for Certiorari. Ethicon's glib characterizations of its discovery abuses are a transparent attempt to persuade this

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[3] Based upon some out of context remarks at the damage trial on August 3, 1992, Ethicon contends that the trial judge had second thoughts about the severity of the sanction. If so, such sentiments were short-lived. *After* making the comments cited by Ethicon, the judge conducted a hearing on Ethicon's Motion to Vacate the Default Judgment and issued a Memorandum and Order dated October 8, 1992, in which he discussed due process considerations and reiterated, in even stronger terms, his finding that Ethicon's actions were willful and in bad faith, and that other sanctions had been considered, "but were not found to be sufficient." (p. 48a)

Court to substitute itself for the trial court as the fact finder. The issue before this Court is not whether Ethicon's conduct was "willful or in bad faith". That issue has been determined conclusively by the state courts. The issue before this Court is whether the state court's imposition of a default judgment on liability for willful, bad faith conduct during discovery violates due process. In its present posture, Ethicon's petition is the civil equivalent of a sentence reduction motion. Distilled to its essence, Ethicon's argument for the writ is that the trial court abused its discretion in finding discovery misconduct of the most serious nature. Thus, the real question Ethicon puts to this Court is nothing more than a thinly veiled evidentiary sufficiency argument and is ill suited for the exercise of certiorari jurisdiction.

## STATEMENT OF THE CASE

### The Factual Background

On October 30, 1985, Helen Eisenmenger underwent surgery by Dr. James Mungas (hereafter "Mungas") to remove plaque in her left carotid artery. The surgery was performd at the Montana Deaconess Medical Center (hereafter "MDMC").

The incision in the artery was closed with Prolene suture. Prolene is the trade name of a suture manufactured, packaged and distributed by Ethicon, Inc.

Two days later, just after Eisenmenger was observed to be "resting quietly" in her hospital bed, blood suddenly spurted from the surgical would in Eisenmenger's neck. Eisenmenger became unresponsive within minutes.

Eisenmenger was rushed to emergency surgery where Mungas, upon uncovering the artery, observed that the

incision in the artery had separated because the Prolene suture had broken approximately midway between the knots on each end of the incision. (EA 289-290)[4] As a result of the breakage of the suture, Eisenmenger suffered a stroke rendering her a severely disabled hemiplegic, who requires 24-hour a day attendant care. (EA 297)

During discovery, Ethicon admitted that in the absence of abnormal arterial forces, post-operative suture breakage occurs spontaneously *only* if its tensile strength has been comprised so that it is too weak to resist normal arterial pressures. (EA 83-84) There was no evidence that the suture was subjected to abnormal arterial forces in the two days before the suture broke. Thus, the tensile strength of the suture was comprised at some time before it was introduced into the artery.

The sterilized suture is not removed from its protective packaging until it is used by the surgeon in the operating room. Thus, in the absence of evidence that the suture was subjected to abnormal arterial forces, there were only two possible causes for breakage of the suture: (1) defect in the suture occurring during the manufacturing and packaging process or (2) damage inflicted by the surgeon during unpackaging and suturing. (EA 302-303) Eisenmenger therefore commenced an action for products liability and medical malpractice against Ethicon, Inc., Mungas and MDMC.

Sometime in 1988, and after becoming aware of Eisenmenger's claim, Ethicon's counsel gave Eisenmenger's medical records to Dr. Cornelius Olcott IV (hereafter "Olcott") for review. In the opinion of Olcott, Mungas erred as follows:

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[4]Citations designated "EA" are to the Eisenmenger Appendix that was filed in the Montana Supreme Court.

1. Mungas failed to refer Eisenmenger to a neurologist following her arteriogram. (EA 175)

2. Mungas should not have performed surgery on the same day on which the arteriogram was performed. (EA 172)

3. Mungas should not have performed a carotid endarterectomy in any event. (EA 172)

4. Mungas employed a substandard suturing technique. (EA 169)

5. Eisenmenger's wound opened not because of suture breakage but because the suture came untied at the proximal knot, as a result of Mungas' substandard suturing technique. (EA 170)

6. Mungas erred in not completely reopening the arteriotomy in preparation for the second surgery. (EA 172)

7. Mungas erred in the timing of his administration of an anti-coagulant. (EA 172)

8. Mungas erred in closing the second arteriotomy with suture rather than patch. (EA 173)

9. Mungas inappropriately monitored Eisenmenger following her second surgery by failing to use a Swan-Ganz catheter. (EA 173-175)

Olcott formed these opinions in 1988; discussed them with Ethicon's counsel at that time; and had other conversations with Ethicon's counsel concerning his opinions over the "ensuing three or four years". (EA 173-174)

Seeking to avoid liability for product defect and in order to blame Mungas, Ethicon, in its answer to the Complaint, asserted four affirmative defenses alleging

that the suture breakage occurred by reason of the "carelessness, negligence or legal fault" of "persons or entities other than this answering defendant"; by reason of "one or more independent intervening causes"; by reason of "misuse of this defendant's product"; and by reason of "alteration or change of the material after it left defendant's custody and control".

There being only two explanations for the breakage of the suture, one attributable to Ethicon and the other to Mungas or MDMC, the handling and use of the suture by Mungas was a central issue of the case.

## The Discovery

Discovery commenced in 1988 and continued over several years, during which Eisenmenger and Mungas, on four occasions,[5] propounded interrogatories to Ethicon requesting that it disclose all information that Mungas mishandled, altered or misused the suture or in any way caused or contributed to Eisenmenger's injuries and damages. Facts, opinion, causation evidence and identities of persons with such knowledge, were sought. Ethicon's responses were always similar. The information sought was not within Ethicon's knowledge, but was "within the knowledge" of Mungas. (EA 117-118) Ethicon had "no present facts" that other persons were careless or negligent. (EA 87-88) Ethicon "does not know at this time" who if anyone, misused the suture. (EA 89-90) Ethicon is "unable to respond" because Ethicon "does not know, and may never know, what . . . occurred." (EA 96-99, 109, 112) Ethicon is "unable to respond" to the question whether

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[5] Eisenmenger interrogatories are dated 4/28/88, 3/2/89 and 6/29/90; Mungas interrogatories, 12/9/91.

any act or omission by Mungas caused Eisenmenger's stroke. (EA 100-103, 113-115)

Although Ethicon was asked to identify all persons with information supporting its responses, Olcott was not mentioned for more than three and one-half years after he had been retained by Ethicon. When Olcott's name was finally disclosed on August 31, 1991,[6] additional interrogatories were immediately (within three days) propounded to Ethicon that were again directed specifically at determining all evidence possessed by Ethicon suggesting that any conduct of Mungas was the cause of Eisenmenger's injuries. Ethicon persisted in concealing the evidence to be offered by Olcott and advised that it did not know of any individuals who would or could testify that Mungas caused or contributed to Eisenmenger's injuries other than "those individuals disclosed in the medical records". (EA 121-123) Simi-

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[6]Ethicon asserts that the parties disclosed the identity of experts in the same manner. This assertion avoids the issue. The issue was not the *identity* of the experts, but the concealment of the opinion evidence of the expert in response to discovery that was clearly intended to elicit such information. Ethicon's assertion is a transparent attempt to divert the Court's attention from the issue before it. The Rule 26(b)(4) interrogatories propounded by Ethicon were answered by Eisenmenger fully and completely and on a timely basis. (EA 142-162) Eisenmenger made both of her liability experts available for early deposition. Prior to depositions curricula vitae and reports were provided to opposing counsel. Eisenmenger permitted the deposition of one expert (Hetzel), which had already lasted eight hours, to be continued to a future date in the event he might modify his opinions based on newly discovered evidence. When opinion evidence on damages was acquired by Eisenmenger, her discovery was promptly supplemented, including complete curricula vitae and full written reports of each damage expert. She permitted Ethicon to depose the damage experts at a time convenient to Ethicon. Most importantly, Eisenmenger *never* failed to provide full, complete and correct answers to written discovery propounded by Ethicon, including *all* information that was then available to her.

larly, the "precise nature" of mishandling by Mungas was "unavoidably unknown" to Ethicon. (EA 121-122)

Ethicon never supplemented its answers to any of the interrogatories which sought information regarding any conduct of Mungas that may have caused Eisenmenger's injuries or with respect to expert opinions regarding Mungas' conduct.

**The Hearings and the Prejudice to Eisenmenger and the Court**

At a pretrial conference on November 27, 1991, the court and counsel specifically discussed whether there was any evidence that the conduct of Mungas was the cause of Eisenmenger's injuries. Because none of the surgical team, including Mungas, implicated any other team member, and because Ethicon had repeatedly indicated it had no evidence implicating Mungas, Eisenmenger limited her negligence theories against Mungas to the doctrine of *res ipsa loquitur.* At no time during the conference did Ethicon reveal the opinion evidence of its expert, Olcott, although it had known of his accusations against Mungas for more than three years.

On January 6, 1992, Mungas moved for summary judgment on the ground that there was no evidence of his negligence and that the doctrine of *res ipsa loquitur* did not apply under the circumstances of the case.

The summary judgment motion was heard on January 28, 1992. Ethicon still made no mention of Olcott's opinions. Believing that there was no evidence of Mungas' fault, the court granted summary judgment to Mungas on February 13, 1992.

Ethicon permitted Olcott's deposition to be taken on March 30, 1992.[7] Olcott testified to the nine errors, *supra,* and admitted that he had advised Ethicon of his opinions more than three and one-half years before the deposition. (EA 173-174)

Upon receiving the transcript of Olcott's testimony, Eisenmenger filed a motion for sanctions because Ethicon, by failing to disclose the opinion evidence of Olcott, had concealed evidence and responded untruthfully to discovery relating to issues that were critical to Ethicon's affirmative defenses, to the court's decision on summary judgment and to tactical decisions by Eisenmenger.

On May 11, 1992, State District Court Judge R.D. McPhillips granted Eisenmenger a default judgment on the issue of liability as a sanction for willful, bad faith discovery abuse by Defendant Ethicon, Inc. over a period of more than three years. (Pet. for Writ, App. B) Trial on damages was conducted from August 3-6, 1992. On October 8, 1992, the trial court issued its Memorandum and Order denying Ethicon's Motion to Vacate Default Judgment. (Pet. for Writ, App. C) On March 24, 1994, the Montana Supreme Court affirmed the decision of the state trial court. (Pet. for Writ, App. A) Ethicon, Inc.'s Petition for Writ of Certiorari presents the question of whether there are "special and important reasons" why

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[7]**Under Rule 26(b)(4) of the Montana Rules of Civil Procedure, a deposition of an opposing party's expert is permissive. Ethicon did not permit Olcott to be deposed until the last two days of discovery, March 30-31, 1992. Relying on the truthfulness of Ethicon's discovery responses, to the effect that Ethicon had no evidence of any conduct by Mungas that could have caused her injury, Eisenmenger had no reason to seek a court order for an earlier deposition.**

the Supreme Court should exercise its discretion to review the decision of the Montana Supreme Court on Writ of Certiorari.

## SUMMARY OF ARGUMENT

Ethicon is not entitled to *de novo* review of the trial court's finding of willfulness and bad faith. The issue is not whether the reviewing court would, as an original matter, have applied the same sanction, the issue is whether the trial court abused its discretion. Default judgment on liability is not an abuse of discretion for discovery abuse that is willful and in bad faith and does not violate due process if it is "just" and relates to the particular claim at issue in the discovery. There are no special or important reasons why the Supreme Court should exercise its discretion to grant certiorari because the federal question urged by Ethicon is settled by decisions of this Court and there is no split among the circuits or among the highest state courts.

## THIS CASE IS NOT APPROPRIATE FOR THE COURT'S EXERCISE OF ITS DISCRETIONARY JURISDICTION

Ethicon persists in its characterization of its discovery responses as merely "evasive" or "incomplete". This fanciful spin glosses over the wholesale evasion of discovery which so troubled the lower courts. Ethicon does not contend that it was unable to disclose the evidence. Nor does it dispute that the discovery responses were, on their face, aimed directly at the evidence of Mungas' conduct that may have caused or contributed to Eisenmenger's injuries; that it had evidence of such conduct for more than three and one-half years; that the evidence was requested in one form or another in more than twenty

interrogatories and on at least four different occasions; and that on at least two occasions Ethicon failed to disclose the evidence at hearings where the conduct of Mungas was at issue.[8] Nor can it seriously dispute the prejudice to Eisenmenger and to the court's decision on Mungas' Motion for Summary Judgment. The trial court presided over the hearing at which Eisenmenger, in reliance upon Ethicon's discovery responses that it had no evidence of Mungas' negligence, relinquished her negligence claims (except for *res ipsa loquitur*) against Mungas. The court noted that, "it cannot be reasonably said" that Eisenmenger would have made such a tactical decision but for Ethicon's concealment.

The trial court also presided over the hearing on Mungas' Motion for Summary Judgment during which

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[8]Ethicon's admission of its strategy to conceal evidence of conduct of Mungas that may have caused Eisenmenger's injuries came in an extraordinary document entitled Supplemental Brief of Defendant/Appellant Ethicon, Inc. dated October 6, 1993, and filed with the Montana Supreme Court. Ethicon observed that the case involved Eisenmenger, on the one side; a well-respected Montana surgeon and a local Montana hospital on another side; and "on the third side of this triangle . . . an out-of-state subsidiary of one of the country's largest health care companies." According to Ethicon, "No sensible attorney would look forward to arguing that Mrs. Eisenmenger's condition was entirely the fault of the local doctor and that any compensation should come from him. . . ." Ethicon, however, acknowledged that it intended to use its evidence of Mungas' conduct on the issue of causation. To further this strategy (to get Mungas out of the case and then point at the "empty chair"), Ethicon concluded that "so long as Dr. Mungas was in the case" Ethicon could conceal its causation evidence, even though the discovery clearly called for all causation evidence involving Mungas, as well as all other types of evidence. In short, Ethicon took the incredible position that it could willfully conceal evidence that was harmful to its trial strategy because it did not have the obligation to prove Eisenmenger's case against Mungas.

Ethicon continued to conceal its evidence. The trial court subsequently granted Mungas' motion in the absence of direct evidence of Mungas' negligence and on the ground that *res ipsa loquitur* did not apply. After Ethicon's discovery abuse had been exposed, the trial court found that it was "very doubtful" that had Ethicon answered its discovery correctly, that Mungas' motion "would have been made or granted".

The trial judge was in the best position to determine the prejudicial effect of Ethicon's conduct on Eisenmenger. He certainly was in the best position to determine the prejudicial effect of the conduct on his own decisions. He carefully weighed the extremity of Ethicon's conduct against the prejudice to Eisenmenger and to a correct decision of the case. He was in the best position to determine whether a sanction should be imposed, and the severity of the sanction.

### A. The federal question urged by Ethicon is settled by the decisions of this Court.

Ethicon cites *Societe Internationale,* for the proposition that Rule 37 sanctions may involve due process considerations. Eisenmenger concedes this general proposition. *Societe Internationale,* however, offers scant comfort to Ethicon. The court in *Societe Internationale,* unlike the present case, specifically found that the plaintiff's failure to comply with pretrial production of documents was due to "inability" beyond its control, rather than to "willfulness, bad faith, or any fault of petitioner." *Id.* at 212. Further, the court in *Societe Internationale* found that plaintiff's inability to produce certain documents during discovery was in spite of plaintiff's "good faith efforts". In the present case, Ethicon

does not (and cannot) assert inability to respond to the discovery. Ethicon is not entitled to *de novo* consideration by this Court of the trial court's finding of willfulness and bad faith. As a reviewing court, this Court accepts the trial court's findings as conclusive. *Id.* at 209. As such, the sanction applied to Ethicon's discovery abuse falls squarely within the rule of *Societe Internationale.*

The rule which applies to willful, bad faith conduct was further enunciated in *National Hockey League v. Metropolitan Hockey Club,* 427 U.S. 639 (1976). Citing *Societe Internationale,* the court in *National Hockey League* upheld the district court's exercise of its discretion in dismissing an action as a sanction for discovery abuse that the district court had characterized as "willful" and in "bad faith".

*Insurance Corporation of Ireland v. Compagnie des Bauxites,* 456 U.S. 694 (1982) is consistent with *National Hockey League.* The district court ordered that defendants respond to discovery related to the issue of personal jurisdiction. The defendants refused to respond on the ground that the court lacked jurisdiction over them and that they were therefore not required to follow its orders. The district court therefore sanctioned their refusal to respond by imposing a finding of personal jurisdiction. Defendants argued that the district court could not impose personal jurisdiction as a matter of law because they had a *right* to deny personal jurisdiction that could not be abrogated by the district court. This Court rejected defendants' argument and upheld the sanction on the grounds of both *Hammond Packing Co. v. Arkansas,* 212 U.S. 322 (1909) and *National Hockey League.*

> Because the requirement of personal jurisdiction represents first of all an individual right, it can, like other such rights, be waived. . . .
>
> The actions of the defendant may amount to a legal submission to the jurisdiction of the court whether voluntary or not.
>
> The expression of legal rights is often subject to certain procedural rules: the failure to follow those rules may well result in curtailment of the rights.

456 U.S. 694, 703-705.

The essence of the rule in *Insurance Corporation of Ireland* is the same as the rule in *National Hockey League* – a litigant may waive its rights, voluntarily or involuntarily, by its conduct.[9]

A sanction that results in a constructive waiver is the "same thing" as the "invocation of a legal presumption" as occurred in *Hammond*. *Insurance Corporation of Ireland*, 456 U.S. at 694, 706. In *Hammond*, the court preserved due process by upholding the presumption that the refusal to produce evidence was "an admission of the want of merit in the asserted defense." 212 U.S. at 351. Ethicon argues that it may purge itself of the consequences of the *Hammond* presumption by coming forward with the concealed evidence after having obtained the advantage of its nondisclosure. This argument is nothing more than a disguised request for *de novo* review of the merits of the concealed defenses – the very defenses that are presumed to be without merit under *Hammond*. In short, Ethicon's interpretation

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[9] Arguably, *Insurance Corporation of Ireland* expands *National Hockey League* to instances in which a litigant's conduct in refusing to participate in discovery is deliberate, but not necessarily willful or in bad faith.

renders the *Hammond* presumption meaningless, and Ethicon cites no authority for its novel position.

The trial court's discretion in selecting the appropriate sanction is limited only by the requirement that the sanction be "just" and that it relate to the particular claim at issue. *Insurance Corporation of Ireland,* 456 U.S. 694, 707; *Wyle,* 709 F.2d 585, 591. Clearly Ethicon's discovery abuse related directly to the central issue of the case – whether the suture breakage occurred from product defect or from conduct of Mungas. The discovery was critical both to Eisenmenger's claim against Mungas and to Ethicon's affirmative defenses to Eisenmenger's claim. In the absence of the evidence against Mungas, all that remained to explain the suture breakage was product defect for which there was ample supporting evidence and for which Ethicon was legally responsible.[10] The presumption from Ethicon's failure to pro-

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[10]The evidence of product defect was substantial: (1) The suture broke midline, rather than at the knot. Ethicon testing indicated that if stress is applied to a *non*-defective suture, the suture will break *at the knot,* rather than midline, because the weakest point is at the knot (EA 208, 224-226); (2) there was no evidence that Eisenmenger did anything to cause the suture failure, as she was "resting peacefully" when the rupture occurred (EA 260-271); (3) Mungas and all other operating room personnel denied having done or observing anything that damaged or compromised the suture; (4) Ethicon had reported numerous other instances of post-operative, *in vivos* failures of Prolene suture when used in carotid endarterectomies (EA 355-356); (5) in the five-year period immediately preceding Eisenmenger's operation, Ethicon noted an alarming increase in reports of Prolene suture breakage of the size suture used in Eisenmenger's operation (EA 367-375); (6) Ethicon's manufacturing process results in the production of vast quantities of defective suture (EA 234-235, 377); (7) Ethicon's visual and tactile quality control procedures are only 80% effective in detecting defective suture (EA 298-301); and (8) Ethicon's other mechanized

[footnote continued]

duce the evidence was that its affirmative defenses implicating Mungas were without merit such that the only explanation for the suture failure was product defect – a presumption wholly consistent with the sanction imposed.

The sanction was also "just". Ethicon admitted that it purposefully adopted a strategy of concealment to get Mungas dismissed from the case before using its evidence of Mungas' conduct on the issue of causation. To advance this strategy, Ethicon responded untruthfully, evasively and incompletely to more than twenty interrogatories that were intended to elicit Ethicon's evidence regarding Mungas' conduct, including both opinion and causation evidence. Ethicon failed to disclose the evidence at hearings where Mungas' conduct was at issue and where it was obvious that the concealed evidence was critical to tactical decisions of Eisenmenger and to the court's decision on pending Motions for Summary Judgment. Ethicon's strategy worked well. By the time the concealed evidence was discovered, Eisenmenger had relinquished negligence claims against Mungas in reliance upon Ethicon's repeated assertions that it had no evidence to suggest fault on the part of Mungas, and the court had granted Mungas' Motion for Summary Judgment. Eisenmenger was entitled to rely on the truthfulness of Ethicon's responses and therefore had no reason to move to compel.[11] Ethicon's concealments were not disclosed

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quality control procedures allow up to 38 out of 10,000 defective suture strands to escape detection. Thus, Ethicon's quality control procedures introduce defective suture into the stream of commerce.

[11]The unique and insidious feature of discovery responses that are untruthful, rather than merely evasive or incomplete, is

[footnote continued]

until after the prejudice had already been wrought. Accordingly, any lesser sanctions would have resulted in Ethicon profiting from its discovery abuse at the expense of Eisenmenger. The trial court was not obliged to try lesser sanctions when they would have been to no avail because the prejudice had already occurred. The course of behavior of Ethicon and the severity of the prejudice demonstrate the "justice" of the trial court's Order.

### B. There is no split among the circuits or among the highest state courts.

Ethicon asserts that the Fifth and Ninth Circuits, and three state courts, apply a rule that is different from other circuits and other state courts. Ethicon's assertion is strained and finds differences where none exist. The Ninth Circuit and the Fifth Circuit, like the other circuits, and the various state courts that have considered the issue, have no difficulty in applying the rule enunciated in *National Hockey League* and *Societe Internationale* in appropriate cases. They have done so without having to reconcile "differences" between *National Hockey League* and *Insurance Corporation of Ireland* imagined by Ethicon.

To make its point, Ethicon misreads the holding in *Securities and Exchange Commission v. Seaboard Corp.*, 666 F.2d 414 (9th Cir. 1982). In *Seaboard* Spellman was in contempt of court for refusal to pay a fine levied by the court for Spellman's failure to attend a deposition.

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**that the innocent party who relies upon the truthfulness of the responses has no reason to move to compel. Thus the trial court has no opportunity to order discovery or to issue warnings unless and until the deception is discovered, which, in this case, was not until *after* the prejudice had occurred.**

As punishment for the contempt of court, the court purported, under Rule 37, to strike Spellman's answer and enter a default judgment against him. The Ninth Circuit, under *Hovey v. Elliott,* 167 U.S. 409 (1897), set the sanction aside since it did not involve discovery abuse but merely punished a contempt. Nowhere does the court in *Seaboard* address the issue raised here, namely, the power to grant default judgment as a sanction for willful, bad faith discovery abuse.

Ninth Circuit cases cited by Ethicon actually support Eisenmenger's position. Thus, in *Munoz-Santana v. U.S. Immigration and Naturalization Serv.,* 742 F.2d 561 (9th Cir. 1984) the Ninth Circuit, citing *Societe Internationale,* found that a default judgment was not warranted "in the absence of willfulness, bad faith, or fault" – the precise rule established in *National Hockey League.* 742 F.2d at 564. Similarly, in *United States v. Sumitomo Marine,* 617 F.2d 1365 (9th Cir. 1980), the Ninth Circuit specifically addressed the due process issue. In affirming a sanction for discovery abuse, the circuit court cited *Societe Internationale* and *National Hockey League* and noted that due process was not violated by the sanction of dismissal where the litigant's conduct has been willful or in bad faith. 617 F.2d at 1369.

Nor does *Fjelstad v. American Honda,* 762 F.2d 1334 (9th Cir. 1985) stand for the proposition asserted by Ethicon. In *Fjelstad,* the court expressly distinguished the facts from cases in which a litigant made "knowingly false denials and deliberate efforts to frustrate the production of documents relating to a critical issue" and found that the conduct of the defendant did not deceive the court about the issues in controversy or threaten to interfere with the correct decision of the case. 762 F.2d

at 1338. It further noted that the district court did not find that the defendant's objections to the discovery were "meritless or that they were imposed in bad faith". The court then went on to discuss the severity of the sanction and expressly found that "fairness demands" that the sanction of default not be imposed "in the absence of willfulness, bad faith, or fault". 762 F.2d at 1340. This, of course, is the very standard applied by the trial court and the Montana Supreme Court in the present case.

Nor has the Fifth Circuit been confused in the application of *Insurance Corporation of Ireland* and *National Hockey League.* Although it was considering a lesser sanction, the Fifth Circuit, in *Chilcutt v. U.S.*, 4 F.3d 1313 (5th Cir. 1993), citing *Societe Internationale,* expressly acknowledged that default judgment is a permissible sanction in cases involving conduct that is "willful or contumacious". 4 F.3d at 1322, fn. 22. Certainly the Fifth Circuit has not hesitated to follow *National Hockey League* in an appropriate case. *Coane v. Ferrara Pan Candy Co.*, 898 F.2d 1030, 1032 (5th Cir. 1990); *Day v. Allstate Ins. Co.*, 788 F.2d 1110, 1113 (5th Cir. 1986); *Glukstad v. Ineas Aereas Nacional,* 656 F.2d 976, 978 (5th Cir. 1982); *Sciambra v. Graham News Co.*, 841 F.2d 651, 655 (5th Cir. 1988); *Kabbe v. Rotan Mosle Inc.*, 752 F.2d 1083, 1084 (5th Cir. 1985); *Prince v. Poulos,* 876 F.2d 30, 32 (5th Cir. 1989).

Finally, Ethicon's assertion that state courts in Arizona, Florida and Texas are in disagreement with state courts in other jurisdictions in applying this Court's rulings in *Hammond* and *National Hockey League* is incorrect.[12] Thus, in *AG Rancho Equipment Co. v. Massey-*

[12]The Arizona and Florida cases cited by Ethicon are decisions of intermediate appellate state courts and, as such, do not

[footnote continued]

*Ferguson,* 123 Ariz. 122, 598 P.2d 100 (1979) the Arizona Supreme Court remanded for a hearing to determine whether a party's failure to comply with discovery had been willful or in bad faith, citing *National Hockey League* in holding that the sanction of default judgment is proper where the failure to comply is due to "willfulness, bad faith or fault", rather than to inability of the party to comply. 498 P.2d at 101. To the same effect, see *Gomez v. Pujols,* 546 So.2d 734, 14 Fla. L. Weekly 1270 (1989 Fl. App. D. 3)[13] and *Transamerican Natural Gas Corp. v. Powell,* 811 S.W.2d 913, 918 (1991) (holding that default sanctions should not be assessed absent "flagrant bad faith" or "callous disregard for the responsibilities of discovery" and citing *National Hockey League*).

Neither the circuit courts nor the state courts have had difficulty in reconciling *Hammond, Societe Internationale, National Hockey League* and *Insurance Corporation of Ireland* because there is nothing to reconcile. Read in conjunction with one another, the rulings are consistent. Litigants are entitled to due process. However, as with other rights, the right to due process may be waived, voluntarily or involuntarily, by conduct. The sanction imposed by the trial court is nothing more than the consequence of an involuntary waiver by conduct. The extent of the sanction is a reflection of the conduct. Where the conduct of a litigant involves discovery abuse that is willful and in bad faith, it is within the discretion of the district court to determine

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necessarily represent the opinion of the highest court of those states.

[13]It appears that the issue has not been addressed by the Florida Supreme Court.

that the litigant has waived its right to due process and that the sanction of default judgment is appropriate.

## CONCLUSION

Ethicon's Petition for Writ of Certiorari is a vain attempt to grace its discovery abuse with a cloak of legitimacy by claiming denial of due process. Ethicon cannot purge itself after the fact from the consequences of its own wrongdoing. After having wrought irreparable prejudice to Eisenmenger's case and to the court's ability to reach a fair decision on the merits, any lesser sanction than the one imposed by the Montana courts would benefit Ethicon at the expense of due process to Eisenmenger.

The trial judge in this case was well aware of the importance of discovery in the search for truth:

> In controlling discovery the district court must regulate traffic to insure a fair trial to all concerned, neither according one party an unfair advantage nor placing the other party at a disadvantage. [Citation omitted] The purpose of discovery is to promote the ascertainment of truth and the ultimate disposition of the lawsuit in accordance therewith. Discovery fulfills this purpose by assuring the mutual knowledge of all relevant facts gathered by both parties which are essential to proper litigation. (p. 26a)

While certiorari is a vehicle for reconciling conflicting decisions of the circuit courts and of the state courts of last resort, certiorari should not be used to homogenize the discretionary functions of those courts. As one commentator said:

> It is both impossible to formulate a body of concrete rules concerning the imposition of discovery sanctions and unwise to do so because such standards would force unique factual situations into generalities devoid of the equitable considerations central to the discretionary function.[14]

In granting a default judgment on liability to Eisenmenger, the discretion which the trial judge exercised and which was affirmed by the Montana Supreme Court was within the range of discretion allowed to the federal circuit courts and the state courts to control flagrant discovery abuses and does not call for an exercise of this Court's power of supervision.

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[14]Note, *Discovery Sanctions Under the Federal Rules of Civil Procedure: A Goal-Oriented Mission for Rule 37*, 29 Case Western Reserve L.Rev. 603 (Spring, 1979).

For the reasons set forth in this brief, Ethicon, Inc.'s Petition for Writ of Certiorari to the Montana Supreme Court should be denied.

Respectfully submitted,

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